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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

Creative Strategy Fund I, and
Creative Strategy, Inc., Petitioners

v.

Prudential Securities, Inc., Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Will a United States District Court enforce an award entered by a government agency which contains a ruling that the fact finder committed error which was not remanded for further deliberations but was withdrawn from those awards which will be considered agency precedent.

Has Congress, by the enactment of the double bond requirement to appeal an administrative agency decision, wrongfully encroached upon the powers of the Judicial Branch of government.

Must a Federal Government Administrative Agency apply the law equally to all participants in an alternative dispute resolution procedure established by an Act of Congress or may fact finding and application of law be allowed to stand as to the participants but withdrawn as to all other parties.

Will a party to the alternative dispute resolution process which wrongfully took control of all of the money of the opponent be estopped to assert the opponent failed to properly file an appeal which required the post of a double bond of the award at the time of the attempted confirmation of the award.

RULE 29.6 DISCLOSURE

Creative Strategy Fund I is a Pennsylvania limited partnership which consists of Creative Strategies, Inc., a Delaware corporation, as the general partner and William S. Scott as the sole limited partner. William S. Scott is also the sole stockholder of Creative Strategies, Inc. Creative Strategies, Inc. has no parent or non-wholly owned subsidiaries.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

Creative Strategy Fund I, and
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v.

Prudential Securities, Inc., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Creative Strategy Fund I (the "Fund") and its General Partner, Creative Strategy, Inc. hereby Petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The denial of the Petition for Rehearing by the Court of Appeals, (App., *infra*, G) is unreported. The Judgment of the Court of Appeals dated January 21, 1997 (App., *infra*, H), is reported at 107 F.3rd 26 (table). The two District Court Orders entered March 11, 1996 and

the opinion dated October 31, 1995 are attached as *Appendixes* A, B and C, respectively.

The Order of the Commodity Futures Trading Commission dated February 8, 1995 (App, *infra*, E), is reported at Creative Strategy Fund I v. Prudential Securities, Inc., Robert Rowland and The Rowland Brothers Co., Inc. [1995 CFTC Decisions] Comm. Fut. L. Rep. (CCH) at paragraph 26,304, at page 42,498 (CFTC Feb. 8, 1995), table; and, the Initial Decision of the Administrative Law Judge (App, *infra*, F) is reported at Creative Strategy Fund I v Prudential Securities, Inc., [1992-1994 CFTC Decisions] Comm. Fut. L. Rep. (CCH) paragraph 26,010 (Initial Decision Feb. 23, 1994), table.

JURISDICTION

The Court of Appeals denied Petitioners' Petition for Rehearing on April 8, 1997, (App., *infra*, G). This Petition to seek review by this Court is filed pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The Commodity Exchange Act, 7 U.S.C. 1, et seq. (the "Act"), provides for the settlement of private disputes among private parties which are alleged to be violations of the Act by the filing of reparation claims. 7. U.S.C.A. Sections 4a(j), 12a(5), and 18(b) (West 1992), and Rule 12.15(a) of the CFTC's Reparation Rules promulgated thereunder.

Any party who loses a reparation case before the CFTC, may appeal the decision to the United States Circuit Court of Appeals where the hearing was held provided they post a bond in double the amount of the reparation award to secure payment of the judgment entered by the court, plus interest and costs, including reasonable attorney's fee, to the appellee, if the appellee should prevail. Sections 6(c) and 14 (e) of the Commodity Exchange Act (7 U.S.C.A. Sections 9 and 18 (d) and (e) (West 1995).

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under the Commodity Exchange Act, 7 U.S.C. 1, et seq. (the "Act"), particularly section 18(d), and Rule 12.407 of the Commodity Futures Trading Commission ("Commission") Rules relating to Reparation, 17 C.F.R. Section 12.407(b) which authorizes a party in whose favor a reparation award is made to seek enforcement of that award to the District Court where the hearing was held.

Reparation is a proceeding administered by the Commission which is intended by Congress to be an alternative dispute resolution procedure whereby customers and commodity industry professionals can obtain a speedy determination of their disputes under the Act by an administrative law judge and, if requested, a review by a commission knowledgeable in commodity industry matters.

There is a severe fault line in the procedure which, unless this Petition is granted, will ultimately destroy the confidence of those who might otherwise use the Reparation process established by the Act.

The brokerage segment of the commodity industry, defined under the Act as Futures Commission Merchants, is the only body authorized by the Act to hold customer money. When a dispute arises, the first move the broker makes is to take control of all of the customer's money on deposit to apply toward the amount the broker claims is due. The customer must present its position in arbitration before the National Futures Association or in Reparation under the Act without the use of the money on deposit at the broker.

Prudential Securities Inc. ("Prudential") initiated this case in arbitration before The National Futures Association (the "NFA"). The NFA arbitration rules required payment of a $5,400 fee for the Fund to file a cross claim against Prudential. The Fund could have brought suit in the courts to test the claim by the NFA that its jurisdiction over the dispute was exclusive but, instead, sought protection of the Commission under the Act.

The commodity brokerage industry knows it has customers financially trapped by the sequester of cash on deposit before the case begins. Under these circumstances, Prudential, and other brokers similarly situated, have abused the alternative dispute resolution

procedures and their customers. This case presents an example of such abuse.

In this case, Prudential and another broker involved in substantially the same dispute had control of all of the Fund's money. Once the dispute commenced, the brokers took control of all of the assets of the Fund rendering it impossible for the Fund to retain legal counsel, pay the $5,400 cross appeal fee to the National Futures Association where Prudential had commenced the action, and post a double bond of the Commission award to gain access to the Courts.

The substantial, frequent users of the reparation process, like Prudential, have learned they can take the risk to commit forgery and other improprieties during the Reparation process against customers who are unable to post the double bond to obtain court review of the proceedings. If their wrongs are successful before the Commission, they keep the money. If they are caught, they merely give back the money which was never theirs and perfect their methods to practice the next time they commit an error in a customer's account.

The customer is caught by surprise. The record is usually confused. When the record of the wrong is preserved, as was the wrongful use of a full set of account forms submitted by Prudential, but the ruling is contrary to law, as in this case, the customer is unable to overcome the double bond requirement to gain access to the courts because the broker had retained all of the

money on deposit to apply to its claim before the adjudication began.

In the Eleventh Circuit, in addition to the double bond requirement, the substantial frequent users of the alternative dispute procedures are shielded by the ruling in the case of Bonar v Dean Witter Reynolds, Inc., 835 F.2d 1378, 1388 (11th Cir. 1988). Bonar holds that the arbitrators and other administrators of alternative dispute resolution processes are responsible for the detection and correction of fraud in their midst.

As the facts of this case demonstrate, those administrators are not equipped to handle this burden. If the work load of the courts is to be relieved, the courts must supervise the quality of the administration of all alternative dispute processes, not just arbitrations. Although the initial work load of the courts will be increased as fraud and other improprieties are brought to the courts to correct, the incidents of those events can be expected to decline, the confidence of the alternative dispute resolution process upheld, and the burden of the courts ultimately relieved.

I. CFTC Commission Order Can Not be Enforced

To briefly explain the proceedings below, in Commodity Futures Trading Commission Reparation Docket No. 93-R014, the following table supplies information on both the segregated cash account and the account that was to be traded pursuant to a power of attorney.

Account A	Account B
Opened on April 6, 1991, with $25,000 Amount on deposit at time of loss in account B $50,733.34	Opened on November 14, 1991, with $15,000 Amount on deposit at time of loss - $15,000 plus profit or loss for the month of March, 1992
Full Set of Documents	Limited Set of Documents controlled by Power of Attorney granted to independent commodity trading advisor
Under control of the General Partner	Trades made by CTA directly with Prudential
No trades at time of loss in account B	Prudential without authority or knowledge of the Fund permitted CTA to place trades using cash from account A as margin
Subject to Transfer Agreement	No transfer agreement; power of attorney only; required automatic termination of account if $15,000 fell to $7,500 or below.

The Fund opened Account B with a deposit of $15,000 to be traded by The Rowland Brothers Co., Inc.,

an independent commodity trading advisor (the "CTA"), pursuant to a power of attorney granted through Prudential, as a Futures Commission Merchant. The only account documents were the power of attorney and the direction to deposit $15,000 in the account. The power of attorney required the account to automatically terminate if the $15,000 fell below $7,500.

Without the knowledge or consent of the Fund, Prudential, to generate commissions, permitted the CTA to place positions in the $15,000 account with the use of the $50,733.34 which was in Account A, the segregated cash account, as margin. This produced an excessive number of positions in the $15,000 account.

When the excessive number of trades placed in Account B by the trader directly to Prudential caused a $166,820.27 loss during the four day period from March 27 through April 2, 1992, Prudential stole the $50,733.34 from Account A to apply to the loss. When the theft was alleged, Prudential, to cover-up its action, forged the account number for Account B into the forms, including the transfer agreement, which were submitted for the cash account six months earlier and presented those forged forms to the reparations hearing before the administrative law judge.

The administrative law judge assigned to hear the case allowed the full set of documents for both accounts, including the forged transfer agreement for account B, to remain in the record and based his decision on those documents. Creative Strategy Fund I v Prudential

Securities, Inc., [1992-1994 CFTC Decisions] Comm. Fut. L. Rep. (CCH) paragraph 26,010 (Initial Decision Feb. 23, 1994).

On appeal by the Fund to the Commission, the Commission ruled the administrative law judge incorrectly considered accounts A&B as a single account and also was wrong to include a full set of documents for account B but called these mistakes harmless error. Those mistakes were material errors which prevented the correct outcome.

The questions presented to the administrative law judge were: (i) are the two accounts segregated for margin purposes; and, (ii) was Prudential liable for the loss in Account B in excess of $7,500 for its failure to properly margin Account B and provide a margin call pursuant to the terms of the power of attorney for Account B. The mistakes corrected by the Commission isolate Account B as a segregated account and specifically rule that only the direction to deposit the $15,000 and the power of attorney governed the administration of Account B. From that point forward, the documents speak for themselves. No oral testimony is necessary to explain the meaning of the documents. The credibility of the Fund witness is no longer at issue.

The Commission justified its finding of harmless error upon the assertion that the parties had agreed before the administrative law judge that only a limited set of account documents had been submitted by the Fund for Account B and the administrative law judge resolved the

issues of credibility against the Fund. Creative Strategy Fund I v. Prudential Securities, Inc., Robert Rowland and The Rowland Brothers Co., Inc. [1995 CFTC Decisions] Comm. Fut. L. Rep. (CCH) at paragraph 26,304, at page 42,498 (CFTC Feb. 8, 1995).

If the parties had agreed, why was it necessary for the Commission to rule it was error to consider a full set of account documents and that Account B was a separate segregated account in its Order. As mentioned above, a scan of the record will disclose that the documents speak for themselves and there is no credibility issue between the parties to be resolved. The Commission corrected these errors by withdrawal of the decision from those which may be considered agency precedent. Although the Commission may withdraw agency decisions which are consistent with other findings and superfluous, it is an abuse of process for the Commission Order to attempt to correct defects by withdrawal of its application to others similarly situated and, thereafter, for the lower courts to grant this defective Order full right of enforcement under the Act.

In fact, no agreement that Account B was controlled by a limited set of account documents ever occurred during the hearing before the administrative law judge. Through cross examination, the Fund was able to have the Prudential witnesses admit that the account numbers on such documents were forged, however, the administrative law judge denied the Motion of the Appellants to strike the full set of account documents submitted by Prudential for account B from the record.

And, in Findings of Fact, paragraphs 3 through 10, the administrative law judge specifically based his decision upon Accounts A&B considered as one account and the application of a full set of account documents for Account B. He resolved the interpretation of the full set of documents in favor of Prudential against the testimony of the Fund. Creative Strategy Fund I v Prudential Securities, Inc., [1992-1994 CFTC Decisions] Comm. Fut. L. Rep. (CCH) paragraph 26,010 (Initial Decision Feb. 23, 1994). See App., *supra*, F.

Also, see the Order of the Commission dated February 8, 1995, at the first full paragraph on page 2, reference to initial decision at 3 (actually paragraph 7 on page 2 of the Initial Decision) and item (1) on page 3, See App. *supra,* E.

The Commission based its decision upon the assertion that the administrative law judge correctly decided the case after a determination of the credibility of the witnesses including the finding that the account statements sent to the Fund were understood by Fund management. But these findings are based upon the lack of segregation of Accounts A&B. Once those accounts are segregated, the testimony of the parties is not relevant. The limited set of account documents speak for themselves. None of those statements disclose the amount of margin used to hold positions in account B.

Although the Commission Order is defective on its face, without a scan of the record, the true merits of the case can not be determined. No scan of the record has

been accomplished by any court to justify the decisions reached thus far. The Fund needs that scan to prove that the account statements which the Commission ruled that Fund management understood did not have any disclosure of the amount of margin used to hold the positions selected by the CTA or that the Fund authorized Prudential to look outside the $15,000 power of attorney account to place trades in that account by use of $50,733.34.

The Commission order was based upon a mistaken set of facts. It is obvious from the failure to cite the right page or paragraph of the Initial Decision, that the Commission did not have a grip on these facts. In its role as the agency responsible for the quality of the administration of the alternative dispute resolution proceeding, the Commission was obligated by the Act to either conduct independent fact finding or, pursuant to the ruling in Bonar v Dean Witter Reynolds, Inc., 835 F.2d 1378, 1388 (11th Cir. 1988), to remand the case to the administrative law judge, for a determination of the effect of the finding of two separate accounts and the deletion of the full set of documents for Account B on the Initial Decision. Petitioner requests this Court to now correct this mistake of law by denial of enforcement of the Commission Order.

The Fund did not participate in the entry of the trades. Nor did it have notice of the amount of equity that was required to hold the positions placed into the account by the commodity trading advisor. The administrative law judge was correct to say there was no

loss limit. But he totally ignored the fact that there was a limit on the number of positions the trader could place in Account B. Had Prudential followed the instructions of the Fund to margin account B with only the $15,000 authorized rather than the entire $65,733.34 the Fund had on deposit in all accounts at Prudential and terminated account B when it fell to $7,499 or below, as required by the power of attorney, the $166,820.27 loss would have been prevented.

An agent must have specific authority from the principal to take action. Prudential was the agent of the Fund. As an agent, it had no authority to use the money on deposit in account A to permit the trader to place positions in account B. The Initial Decision and the Commission affirmance were based upon the obligation of the Fund to limit the authority of the agent rather than the correct application of the law which requires the agent to prove the extent of its authority. Sansom Refining Co. v Drexel Burnham Lambert, Inc. [1986-1987 Transfer Binder] Comm.Fut.L.Rep. (CCH) #23,796 (CFTC July 20, 1987) at page #34,108; CFTC v Savage, 611 F.2d, 270 at 285 (9th Cir.1979); First National Monetary Corporation v Weinberger, 819 F 2d 1334, at 1342 (6th Cir.1987); Marchese v Shearson, 734 F 2d 414, at 418 (9th Cir.1984); Woods v Reno Commodities, Inc., 600 F. Supp. 574 (1984) n 1 at 578.

In apparent deference to the mistakes made in the proceedings, the Commission withdrew the Initial Decision and its Order from those decisions which may be cited or considered agency precedent. Creative

Strategy Fund I v. Prudential Securities, Inc., Robert Rowland and The Rowland Brothers Co., Inc. [1995 CFTC Decisions] Comm. Fut. L. Rep. (CCH) at paragraph 26,304 at page 42,498 (CFTC Feb. 8, 1995).

The effect of this withdrawal combined with the finding that the administrative judge had considered documents which should have not been in the record, is the grant of permission by the Commission for Prudential to steal the Fund's money on deposit in account A. This is intentional unequal treatment of parties to the alternative dispute resolution process by a government agency. This Court is asked to correct this mistake of law committed by the Commission by denial of enforcement of the Commission's Order.

II. Appeals of Agency Proceedings Must Be Granted the Same Rights as Appeals of Arbitration Proceedings

No scan of the record by a court of competent jurisdiction has been accomplished in this case. If this were an arbitration proceeding, such scan of the record would be required. See First Options of Chicago v. Kaplan, 115 S.Ct. 1920 (1995). Federal Arbitration Act, 9 U.S.C. 1, et seq.

There is no justification for the creation of different rights of appeal for alternative dispute resolution awards from proceedings established by the Commodity Exchange Act from awards made in proceedings established by other administrative agencies

such as the National Association of Securities Dealers, Inc. or the American Arbitration Association.

If the ruling in First Options, supra 115 S. Ct. 1920, is to be utilized to preserve confidence in the alternative dispute resolution process, it must be extended to agency proceedings where one of the parties alleges fraud.

III. Double Bond Requirement of Appeal of Agency Proceeding Prevents Fair Access to Courts

The failure of the Fund to post the double bond to perfect its appeal of this case to the 11th Circuit pursuant to the Act or to appeal the denial of the attempt to the 11th Circuit to this court was directly caused by the theft by Prudential of all of the money the Fund had on deposit.

At the time of the award, the Fund was without the resources to file a Petition to this Court of the Denial of its attempt to appeal the CFTC award made to the 11th Circuit at case number 95-4337.

Creative requests this court to accept the review of this case because the Commission Order is defective on its face and can not be enforced or, in the alternative, it was Prudential's theft of its money which prevented an appeal to this Court at the time of denial of the appeal to the 11th Circuit for failure to post a bond of double the award or, in the alternative, Creative requests a ruling that a party to a reparation be allowed to contest the propriety of an award at the time of the attempted

confirmation of that award or, in the alternative, the that the ruling in First Options, supra 115 S. Ct. 1920, justifies the grant of this Petition.

An issue to be resolved by this case is do the Constitutions of the United States and the State of Florida require Court supervision of the Federal government administrative agency alternative dispute procedures to be certain the law has been correctly applied and are otherwise fair. Congress has codified the obligation for judicial supervision of arbitration proceedings in the Federal Arbitration Act, 9 U. S. C., 1 et seq. (the "FAA"). The FAA applies to proceedings conducted by quasi-public and private organizations but Congress specifically denied the courts the opportunity to supervise similar proceedings between private parties conducted by government agencies such as Commission reparations under the Act. The Act provides that those proceedings may be supervised by the courts only after the post of a bond equal to double the amount of the award by the appellant.

The application of the double bond requirement has denied the Fund the equal protection of the law guaranteed by the United States and Florida Constitutions. The powers of Congress and the Courts are to be separate. The enactment of the double bond requirement is an encroachment upon the powers of the Judicial Branch of government.

In addition, public policy dictates that government agency administrative dispute resolution procedures

established by Congress are established, in part, to relieve the congested court system. Accomplishment of that goal requires unburdened access to the courts to review proper application of the law and fairness in those proceedings.

At the present time, the double bond requirement denies jurisdiction for appeal to those who can not post the bond. Kessenich v CFTC, 684 F. 2d 88, 91-93 (D.C. Cir 1982); Chicago Commodities, Inc. v CFTC, 811 F. 2d 1262 (9th Cir. 1987); Clayton Brokerage Co. of St. Louis, Inc. v. Bunzel, 820 F. 2d 1459 (9th Cir. 1987); Creative Strategy Fund I v. CFTC, Docket No. 95-4337 (11th Cir May 10, 1995).

It is illogical to permit access to the courts to review questions of law and fairness which apply to the arbitration process *de novo* as required by the Federal Arbitrations Act, 9 U. S. C. 1, et seq.; [First Options decision, 115 S.Ct. 1920 (1995)], while brokers have the power to render their customers financially unable to cause the same review of Commission decisions.

See Myron v Martin, 670 F.2d 29 (5th Cir. 1982) for the application of the false premise that the double bond requirement is equal for all participants. Nothing could be further from the truth. The poor and those who have had their money confiscated by brokers are denied access to the courts by the double bond requirement.

The Myron Court also missed the difference between the post of a bond which prevents review of the

decision and the failure to post a bond which simply permits the opponent to commence collection procedures. Collection procedures against a destitute opponent are harmless while denial of access to an appeal affects the substantial Constitutionally protected rights of those unable to pay. It is egregiously wrong for one of the parties to the process to be able to exercise power conferred by the same law that established the reparation process to render the opponent unable to pay to perfect an appeal.

To correct this miscarriage of justice requires review of the law and facts of this case by this court with the end that procedures to guarantee access to the courts pursuant to the Federal and Florida Constitutions for all persons, rich and poor alike, will be preserved.

At the present time it is the size of the mistake made by the administrative agency which controls the right of the participant to gain court review of a Commission decision. The quality of the participant's position must be the only determining factor for an appeal to the courts. To determine the quality of that position requires a scan of the administrative record. That scan must be afforded to all who claim wrongs were committed during the agency alternative dispute resolution process without the post of a double bond requirement.

There can be no equal justice when the right to file an appeal depends on one's ability to pay. Chief Justice Barkett concurring opinion in Psychiatric Associates v.

Siegel, 610 So.2d 419, 426 (Fla 1992) citing Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). The fact the Fund is a Partnership should not prevent its access to the Courts under the due process clause of the Federal and Florida Constitutions.

In addition to its prima facie equal protection argument, the Fund relies upon the equal protection implicit in the due process clause of the Fifth Amendment. See O'Day v George Arakelian Farms, Inc. 536 F.2d 856 (9th Cir 1976) which held that no act of government may deny indigents an appeal from an adverse decision.

This is particularly applicable to this case because:

(a) the act of theft by Prudential was the direct cause of the inability of the Fund to post the double bond and, therefore, Prudential is estopped to contend an appeal to the Eleventh Circuit was the exclusive method for the Fund to cause a court review of the Commission decision; and,

(b) the Commission, in an obvious deference to the mistakes made during the proceeding, without independent findings of fact or conclusions of law, withdrew the administrative law judge decision and the Commission Order from those which may be considered agency precedent.

The waiver of the bond is essential when the authorized account size of $15,000 has no relationship to the $101,087.53 award; and, when Prudential stole $50,733.34 from the Fund to apply to the loss before any hearing on the merits; and, when Prudential covered-up its theft by the submission of forged account documents to the administrative hearing.

In addition, the Fund asserts that the theft of its money in account A by Prudential was the direct cause of the Fund's inability to post the bond or, in the alternative, the Fund asserts that the amount of the bond it should be required to post must be limited by the amount of equity it authorized to be placed at risk in account B; i.e., $15,000.

In a reparation proceeding, the Commission may adjudicate a claimant's allegations only of violations of the Act and Commission regulations and orders. The Commission proceedings do not resolve other violations of law or collection of debit balances or any claims arising under state law. Blunt, Ellis & Loewi, Inc. v Hlavinka, 896 F.2d 240, 241 (7th Cir. 1990).

In the Blunt case, the court ruled that a customer's state law claims for breach of contract and negligence against a commodity broker which could not have been litigated in antecedent reparations proceeding not be barred in later state court action under doctrine of res judicata. The Answer, Cross Claim and Third Party Complaint, to the extent they were not related to violations of the Commodity Exchange Act, were

improperly struck from the record by the lower court in this case.

The trial court struck the Fund pleadings and granted the Prudential Motion for Confirmation of the Award. The United States Court of Appeals without opinion, Affirmed the lower court decision and denied the Fund's petition for rehearing.

This Court is asked to deny enforcement of a Commission Order which is defective on its face by virtue of the obvious need for additional fact finding once accounts A&B are deemed segregated and controlled by two different sets of account documents.

REASONS FOR GRANTING THE PETITION

Now that the Fund has experienced the chill of the successful practice of fraud against it before the Commission, the Fund will never seek the aid of reparations to resolve a dispute again. In addition, the Fund doubts anyone who knows the facts of this case would file a reparations claim. Informed counsel for customers must now recommend these claims be brought to the courts to insure a level playing field.

The precedents established by this case and others like it will ultimately place an undue burden on the court system because the Act permits potential participants to elect to initiate their proceedings before the courts rather than by reparation before the Commission.

It was clear legal error for the Commission, in its appellate function, to find there were two separate accounts controlled by two separate set of account documents without a remand of the decision to the fact finder for a determination of the effect of the correction of those mistakes upon the award. This clearly erroneous decision must not be enforced.

Prudential and the Commission must be required to be certain administrative hearings correctly apply the law and are free from fraud and other wrongdoing. The message Prudential and other brokers similarly situated have been sent thus far by this and other similar cases is that fraud pays. Prudential has the $50,733.34 which belongs to the Fund. In addition, Prudential has an award of $101,087.53 to apply to the loss it created by its failure to follow the terms of the power of attorney for account B.

It is impossible to read the Commission Order to detect the use of forged documents. One can detect that accounts A&B should have been treated as two separate segregated accounts rather than as a single account and that less than a full set of account documents should have been at issue before the administrative law judge. How could the question of two separate versus one account and a reduction in the number of account documents be deemed harmless in a dispute over the amount of margin available to hold positions in the name of the Fund. Particularly, when the review of the proper documentation removes the issue of credibility of the witnesses from the case. The lower courts have

erroneously enforced an order which is defective on its face.

It is important for the integrity of the alternative dispute resolution process to be certain that fraud is never tolerated.

The facts of this case occur too frequently. As a reading of the opinions below will disclose, the facts and legal issues are often obfuscated. Often, the claimant is thwarted by the presence of the ruling in Bonar, supra, at 1388, or a procedural error or a Rule 11 challenge against their legal counsel which has no bearing on the merits but which prevents the presentation of the case to the courts on appeal, or by the prohibitive time and cost to appeal to this court. Please do not think the alleged fraud and incorrect application of the law presented by this case are isolated events. They are not. This case is worthy of your review.

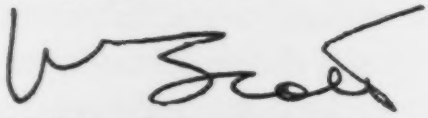
CONCLUSION

The time of the judicial system is required to supervise the alternative dispute resolution process. This is no less true when that process is established by Congress. A review of this case will permit the court to establish meaningful guidelines for the procedural aspects of alternative dispute resolution proceedings.

Although claimants are not as well organized as industry associations, the word will spread that reparation under the Act and other proceedings like it are presently

traps for those who rely upon the use of their money on deposit during the hearing process or the expectation that the substantial frequent users of the process will be honest in their presentations. As information of appropriation of assets on deposit at the time the dispute occurs and dishonest behavior by brokers during the hearing process becomes known, the courts will be faced with the decision to either deny access of commodity disputes altogether or to otherwise deal with severely overcrowded conditions.

Respectfully, submitted,



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-8423-CIV-GRAHAM

PRUDENTIAL SECURITIES, INC.,

Petitioner(s),

vs.

CREATIVE STRATEGY FUND I et. al.,

Respondents(s).

_____/

FINAL JUDGMENT

FILED by s/pzl D.C.
MAR 11 1996
CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA. — MIAMI

THIS CAUSE came before the Court upon Prudential Securities Incorporated's ("PSI") Petition to Enforce Arbitration Award, and upon PSI's Motion for Approval of Proposed Final Judgment (DE 25). The Court having reviewed the pleadings and legal memoranda submitted by the parties and being otherwise fully advised in the premises it is hereby ordered and adjudged as follows:

1. Final Judgment is entered in favor of Prudential Securities Incorporated and against Creative Strategy Fund I and Creative Strategies, Inc.

2. Plaintiff Prudential Securities Incorporated shall recover from Defendants Creative Strategy Fund I and Creative Strategies Inc. the sum of $101,087.53 in principal, with prejudgment interest in the amount of $5,041, for a total amount of $106,128.53 that shall bear interest at the legal rate for which let execution issue.

3. In addition to the foregoing, pursuant to 7 U.S.C. S 18(d), Creative Strategy Fund I and Creative Strategies Inc. are

hereby ordered to pay the sum of $5,511.25 to Prudential Securities Incorporated which represents a reasonable fee incurred by it in prosecuting this action, for which let execution issue.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th March, 1996.

s/ Donald L. Graham
Donald L. Graham
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-8423-CIV-GRAHAM

PRUDENTIAL SECURITIES, INC. ,

Petitioner(s),

ORDER

DOCKETED
MAR 27 1996
WASHINGTON OFFICE

vs.

CREATIVE STRATEGY
FUND I et. al.,

Respondents(s).

FILED by s/ pzl D.C.
MAR 11 1996
CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA. — MIAMI

THIS CAUSE came' before the Court upon Prudential Securities Incorporated's Motion to Strike Respondents, Answer, Affirmative Defenses, Cross-Claim and Third-Party Complaint (DE 26).

THE COURT has considered the Motion and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the motion is hereby GRANTED IN PART. The Respondents' Answer, Affirmative Defenses, Cross-Claim and Third-Party Complaint (DE 24) is hereby STRUCK FROM THE RECORD. However, Prudential's request for attorneys' fees for the costs of this motion is hereby DENIED. The Final Judgment entered concurrently herewith is dispositive of the issues and this case is closed .

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of March 1996.

s/ Donald L. Graham
Donald L. Graham
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-8423-CIV-GRAHAM

PRUDENTIAL SECURITIES, INC. ,

Petitioner(s), **ORDER**

vs.

CREATIVE STRATEGY
FUND I et. al.,

Respondents(s).

FILED by s/pzl D.C.
OCT 31 1995
CARLOS JUENKE
CLERK U.S. DIST. CT.
S.D. OF FLA. — MIAMI

THIS CAUSE came before the Court upon the following:

1. Respondents' Petition for Temporary Restraining Order and Memorandum of Law (DE 15); and

2. Respondents' Rule 12(b) Motions and Memorandum of Law (DE 7).

STATEMENT OF FACTS

Prudential Securities, Inc. ("Prudential") initiated this action pursuant to 7 U.S.C. § 18(d) and 17 C.F.R. § 12.407 against Creative Strategies Fund I and Creative Strategies, Inc. to enforce a Reparations Order issued by the Commodity Futures. Trading Commission ("CFTC").

Creative Strategies Fund I was a limited partnership created by William Sumner Scott ("Scott") for commodities trading. Creative Strategies Fund I shall hereinafter be referred to as "Creative Ltd." Scott was the sole limited partner of Creative Ltd. The general partner of Creative Ltd. was Creative Strategies, Inc. ("Creative

Inc."), a corporation in which Scott was the sole stockholder and president.

In or about April 1991, Scott opened account number ASH 960342 at Prudential under the name of Creative Ltd. Several account forms were completed to open this account. Included in one of these documents was an Arbitration Agreement which Scott argues was not validly executed.

As Scott was unsuccessful in his trading, in or about November 1991, he began to employ various Commodities Trading Advisors ("CTAs") to trade the account.

Scott hired R.E. Maseri and opened Prudential account ASH 960792. Scott also hired The Rowland Bros. Company, Inc. and opened Prudential account ASH 960784.

Scott argues that these new Creative Ltd. accounts were separate from the original 960342 Creative Ltd. account. Therefore, Scott argues that these accounts were governed by their own account documents, and not by the account documents which governed the operation of the 960342 account. Prudential argues that these new accounts were sub-accounts of the original 960342 Creative Ltd. account. Therefore, Prudential argues that these new accounts were governed by the same account documents that governed the 960342 account plus a few additional supplementary account documents that were necessary for each new CTA.

In or about March of 1992, the Rowland account began to sustain large losses which resulted in margin calls, the liquidation of the Creative Ltd. accounts and a final debit balance owed by Creative Ltd. to Prudential in the amount of $101,087.53.

On or about May 26, 1992, Prudential initially filed a claim before the National Futures Associations ("NFA") to recover the debit balance. Prudential filed this claim against Scott, Creative Ltd. and Creative Inc.

On or about October 30, 1992, Scott filed a claim before the CFTC. This proceeding was entitled Creative Strategy Fund I v. Prudential Securities, Incorporated, Robert Rowland, and the Rowland Brothers Company, Inc., CFTC Docket No. 93-R014.

Prudential was thereafter ordered to withdraw its NFA claim against Creative Ltd. and Creative Inc. Prudential complied with this order and thereafter filed its claims against Creative Ltd. and Creative Inc. as a counterclaim in the CFTC proceedings. The CFTC accepted the counterclaim against Creative Ltd. and Creative Inc. However, the claim against Scott remained pending before NFA. NFA stayed that proceeding pending the outcome of the CFTC proceeding.

In the CFTC proceedings, Prudential argued that all of the Creative Ltd. accounts were managed collectively for equity calculations and margin call purposes. Therefore, Prudential argued that the actions taken against Creative Ltd. were based on the collective value of the Creative Ltd. accounts, and that the funds of all of the accounts' were accessible for covering losses that were sustained in any one of them. Prudential also argued that when an account utilized multiple CTAs, sub-accounts were created for each CTA so the owner of the account could track the performance of each CTA.

Scott maintained that all of the Creative Ltd. accounts were separate. Therefore, he argued that the margin utilized in the Rowland account exceeded what was authorized for that account. In addition, he argued that the funds in each of the Creative Ltd. accounts could not be viewed collectively, and could not be transferred or applied to cover losses in any of the other accounts. Therefore, Scott argued that if Prudential had treated each of the accounts separately, the margin trades and losses in the Rowland account would never have reached the high dollar amount necessary for liquidating the other accounts and the high debit balance would never have been incurred. Scott further argued that no valid arbitration clause existed for any of the Creative Ltd., accounts. Therefore, he maintained that NFA and CFTC did not have jurisdiction over the dispute.

These issues were litigated before the CFTC. Initially, Administrative Law Judge ("ALJ") Painter found for Prudential and against Creative Ltd. and Creative Inc.

Scott appealed this decision to the CFTC Panel pursuant to 17 C.F.R. § 12.401. The Panel affirmed with some modification, the ALJ's Order.

Scott then filed an appeal to the Eleventh Circuit Court of Appeals pursuant to 7 U.S.C. § 18(e). However, this appeal was dismissed because Scott did not comply with a statutory bond requirement which was set forth in 7 U.S.C. § 18(e).

Thereafter, Scott filed a complaint in state court to collaterally attack the CFTC order. Prudential moved to dismiss the action, but the motion was denied.

Prudential also moved the NFA to reopen the proceedings against Scott. The NFA set a hearing date for the claim against Scott for October 31, 1995.

In addition, Prudential filed the instant action to enforce the CFTC order pursuant to 7 U.S.C. § 18(d). In this action, Creative Ltd. and Creative Inc. have moved to dismiss Prudential's Petition and have moved for a temporary restraining order to enjoin the NFA proceeding.

DISCUSSION

7 U.S.C. §§ 18(d) and 18(e) state in pertinent part:

(d) Enforcement of reparation award

> If any person against whom an award has been made does not pay the reparation award within the time specified in the Commission's order, the complainant, or any person for whose benefit such order was made, within three years of the date of the order, may file a certified copy of the order of the Commission, in the district court of the United

States for the district in which he resides or in which is located the principal place of business of the respondent, for enforcement of such reparation award by appropriate orders. The orders, writs, and processes of such district court may in such case run, be served, and be returnable anywhere in the United States. The petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. Subject to the right of appeal under subsection (e) of this section, an order of the Commission awarding reparations shall be final and conclusive.

(e) Review

Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located, under the procedure provided in section 9 of this title. Such appeal shall not be effective unless within 30 days from and after the date of the reparation order the appellant also files with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States. The appellee shall not be liable for costs in said court. If the appellee prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

7 U.S.C.A. § 18 (d) and (e) (West 1995).

The matters upon which Creative Ltd. and Creative Inc. base their motion to dismiss and motion for temporary restraining order are matters that were already litigated before the CFTC. The proper forum to review the CFTC Reparations order is the United States Eleventh Circuit Court of Appeals. Creative Ltd. and Creative Inc. did not perfect their appeal to the Eleventh Circuit as required pursuant to 7 U.S.C. § 18 (e) . Having failed to perfect their appeal, Creative Ltd. and Creative Inc. cannot now litigate the same matters before this Court. This Court's jurisdiction over this matter is limited to the terms set forth in 7 U.S. C. § 18 (d) . The terms of § 18 (d) clearly state that the CFTC Reparations Order is final and conclusive unless an appeal is taken to the United States Court of Appeals pursuant to 18(e).

In light of the above, Creative Ltd. and Creative Inc. cannot meet the standards for enjoining the NFA proceedings.[1] For an injunction to issue, the moving party must establish the following:

1. a substantial likelihood that the movant will prevail oh the merits;

2. that the movant will suffer irreparable injury if an injunction is not issued;

3. that the potential injury to the movant outweighs the possible harm to the nonmovant; and

4. that the injunction would not be adverse to the public interest.

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[1] Prudential has also argued that this Court cannot enjoin the NFA proceeding because it is a separate proceeding between different parties. The NFA proceeding is between Prudential and Scott, whereas the instant action is between Prudential and Creative Ltd. and Creative Inc. For the purposes of this decision, this Court assumes, without deciding, that it would have jurisdiction to enjoin the NFA proceeding if Creative Ltd. and Creative Inc. could meet the substantive requirements of an injunction.

Frio Ice, S.A. v. Sunfruit, Inc., 918 F.2d 154, 159 (11th Cir. 1990).

As stated above, it does not appear that Creative Ltd. and Creative Inc. are likely to succeed on the merits of their claim that Prudential's Petition to Enforce the CFTC Reparations Order should be dismissed. Therefore, they are not entitled to an injunction staying the NFA proceedings.

Furthermore, for the reasons stated above, Creative Ltd. and Creative Inc.'s Motion to Dismiss must be denied. Since the Court has considered materials submitted by both parties which go beyond the allegations set forth in Prudential's Petition to Enforce the CFTC Reparations Order, the Court is treating the Motion to Dismiss as a Motion for Summary Judgment.

Summary judgment is appropriate only if it appears through pleadings, depositions, admissions and affidavits that there is no "genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552., 91 L.Ed.2d 265, 273 (1986); Real Estate Financing v. Resolution Trust Corporation, 950 F.2d 1540, 1542 (11th Cir. 1992); McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1493 (11th Cir. 1988), cert. den., 490 U.S. 1084, 104 L.Ed.2d 670, 109 S.Ct. 2110 (1989).

Creative Ltd. and Creative Inc. have not established that they are entitled to dismissal of Prudential's Petition as a matter of law.

CONCLUSION

In light of the above, it is hereby ORDERED AND ADJUDGED as follows:

1. Respondents' Petition for Temporary Restraining Order and Memorandum of Law (DE 15) is DENIED; and

2. Respondents' Rule 12(b) motion and Memorandum of Law (DE 7) is DENIED. It is also

ORDERED AND ADJUDGED that plaintiff Prudential Securities, Inc. shall file a Motion for Approval of Proposed Final Judgment with the Court on or before November 15, 1995. This motion shall have attached to it as Exhibit A, a Proposed Final Judgment which includes the amount of the judgment and the amount of interest due. In addition, to the extent that Plaintiff seeks attorneys' fees and costs, entitlement to such relief must be verified by proper affidavits. The motion shall indicate whether or not the form and content of the Proposed Final Judgment has been approved by opposing counsel. If defendants do not agree with the form and content of the proposed final judgment, they shall file any opposition to plaintiff's motion on or before November 30, 1995. Plaintiff shall file any Reply Memorandum on or before December 8, 1995.

DONE AND ORDERED in Chambers at Miami, Florida, this 21st day of October, 1995.

s/ Donald L. Graham
Donald L. Graham
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION
2033 K Street, N.W.
Washington, D.C. 20581

CERTIFICATION

I, Tempest S. Thomas, do hereby certify that I am the Proceedings Clerk of the Commodity Futures Trading Commission, an independent regulatory agency of the United States Government; have authority to maintain the Seal of the agency; that in that capacity I am custodian of and familiar with the official public documents of this Commission; that the annexed and foregoing are true and correct copies of the Initial Decision and Commission Order in the case entitled Creative Strategy Fund I v. Prudential Securities, Inc., Robert Rowland and The Roland Brothers Co., Inc. CFTC Docket No. 93-R014

In testimony whereof I have hereunto caused the Seal of the Commodity Futures Trading Commission to be affixed and my name subscribed in the District of Columbia this 29th day of June 1995.

Mary Schapiro, Chairman

By: s/ Tempest S. Thomas
Tempest S. Thomas, Proceedings Clerk

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UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

CREATIVE STRATEGY FUND I	:	CFTC DOCKET NO. 93-R014
V.	:	
	:	ORDER
PRUDENTIAL SECURITIES, INCORPORATED, ROBERT ROWLAND, AND THE ROWLAND BROTHERS COMPANY, INC.	:	OFFICE OF PROCEEDINGS PROCEEDINGS CLERK **FEB 8 3:55 PM '95** FILED

Creative Strategy Fund I ("Creative") appeals from an Administrative Law Judge's ("ALJ") dismissal of its complaint and award of $101,087.53 to respondent Prudential Securities, Incorporated ("Prudential") on its debit balance counterclaim. Creative challenges the ALJ's substantive analysis, arguing that the record establishes that respondents breached their fiduciary duties under Sections 4b and 4o of the Commodity Exchange Act ("Act") and executed unauthorized trades in violation of Section 4d of the Act. In addition, Creative raises several procedural challenges to the ALJ's disposition of its claims. Respondents urge us to dismiss the appeal,[1] or in the alternative, to affirm the initial decision. They argue that the ALJ properly determined that the record does not support complainant's allegations of wrongdoing. They also claim the judge's procedural rulings were well within his discretion.

Our review of the record and the parties' appellate submissions establishes that the presiding officer committed no error material to

[1] Respondents argue that Creative's brief does not meet the requirements of Commission Rule 12.401(d). In response, Creative filed an amended brief and a motion to accept its brief out of time. In the circumstances of this case, we accept Creative's amended brief and resolve this matter on the merits.

the outcome of this proceeding. Moreover, with the exception noted below, the complainant has not raised important questions of law or policy that merit extended discussion. In light of these circumstances, we are affirming the result of the initial decision without opinion.[2]

One of Creative's challenges to the ALJ's factual findings merits a correction of the record. The ALJ found that complainant executed a full set of account-opening documents for each of the three accounts it maintained at respondent Prudential.[3] Initial Decision at 3. The judge did not cite to any evidence that supports this finding, however, and all parties agree that Creative only executed supplementary new account documentation for two of the accounts (including the one Rowland controlled). In these circumstances, we amend the initial decision to reflect the consensus of the parties.

Despite this error, we find that the factual assessments material to the ALJ's resolution of this matter are sufficiently reliable to warrant our deference. Compare Wisbey v. Merrill Lynch, Pierce,

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[2] Creative's procedural challenges include assertions that the ALJ erred in (1) denying its motions to compel and failing to extend the discovery period, (2) admitting allegedly fraudulent exhibits into evidence at the hearing, and (3) failing to admit into the record the documentary evidence complainant proffered after the hearing. Complainant in effect asserts that rulings in its favor on these issues would have compelled a different result in this case. As discussed at pages 2-3 below and at note 4, however, these challenges focus on documents that are immaterial to the reliable resolution of the claims at issue. Moreover, Creative's arguments n support of these challenges do not establish that the judge abused his discretion.

Similarly, Creative's argument in support of its claim of ALJ bias does not demonstrate either the extrajudicial or pervasive bias necessary to support a request for disqualification. See Olson v. Ulmer, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,987 at 36,627 (CFTC Jan. 23, 1991). Indeed, the record establishes that the ALJ provided Creative a fair opportunity to develop the record on facts material to its claim.

[3] Prudential acted as Creative's futures commission merchant during the period at issue in this case. Respondents The Rowland Brothers Company, Inc. and Robert Rowland (collectively referred to as "Rowland") acted as a commodity trading advisor for one of the accounts Creative maintained with Prudential.

Fenner & Smith, Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,594 (CFTC Feb. 12, 1990). The record shows that during the time at issue, complainant maintained three futures accounts with respondent Prudential. Creative authorized respondent Rowland to execute trades in one of its accounts. The parties' dispute focuses on the amount of funds Creative authorized Rowland to obligate on its behalf.

In presenting its case to the ALJ, Creative contended that both Rowland and Prudential knew that Rowland could only obligate $15,000 of Creative's funds to margin trades in the account Rowland controlled, but that both registrants simply ignored this agreed-upon limitation. Creative offered both documentary evidence and testimony to substantiate its claim. Respondents denied that any specific spending limit was established. In support of these denials, they emphasized that Creative (1) executed an agreement authorizing Prudential to transfer funds among its various accounts for margin purposes, and (2) failed to protest despite ongoing knowledge that Rowland had established positions that put far more than $15,000 of Creative's funds at risk.

The ALJ resolved this credibility dispute against complainant, finding that neither the testimony of Creative's witness nor the documents it submitted established that there was a "loss limitation" on the account Rowland was authorized to trade. Initial Decision at 3, 6. In support of this finding, the ALJ emphasized Creative's active supervision of Rowland's trading, rejecting its claim that it neither discussed the trades with Rowland nor reviewed the equity runs provided by Prudential. On the contrary, the ALJ found that Creative was "intimately acquainted with every detail of the trading that took place." Initial Decision at 6. In addition, the ALJ specifically credited Rowland's testimony that Creative received, reviewed, and understood the written equity runs Prudential provided. Initial Decision at 6.

Complainant has not established that the error discussed above had a material impact on the ALJ's resolution of these key factual issues. Indeed, as the ALJ's resolution is both reasonable and

supported by the record as a whole, we affirm it.[4] While we counsel the ALJ to exercise more care in his future fact-finding, we find no basis for overturning the result of his decision.[5] Accordingly, the initial decision, as modified above, is affirmed.

IT IS SO ORDERED.[6]

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[4] Creative also argues that the ALJ erred by failing to determine that Prudential prepared and distributed a separate equity run for each of its three accounts rather than the consolidated equity run it introduced into evidence at the hearing. Resolution of this contention is unnecessary in view of our affirmance of the ALJ's conclusion that complainant failed to establish that respondents agreed to a $15,000 limit. In any case, even assuming that Creative's ongoing knowledge of respondents' trading were material, we find that the account statements Creative acknowledges receiving (see Exhibit C-19, Tr. 72-73, 147) were sufficient to put it on notice that Rowland was maintaining positions that obligated more than $15,000 of its funds. In these circumstances, there is no basis for concluding that the format of the equity runs Creative received is material to the reliable resolution of its claims. For this reason, we deny complainant's post-hearing request for an order requiring Prudential to preserve margin evidence relating to its equity runs.

[5] Because the presiding officer's findings (as modified) and conclusions are supported by the weight of the evidence, they shall be deemed the Commission's for purposes of appellate review. Nevertheless, the initial decision shall not be cited as Commission precedent or generally regarded as an expression of the Commission's views on the issues resolved by the presiding officer.

[6] Under Sections 6(c) and 14(e) of the Commodity Exchange Act (7 U. S. C. Sections 9 and 18 (e) (1982)) , as amended by The Futures Trading Practices Act of 1992, Pub. L. No. 102-546, 106 Stat. 3590 (1992), a party may appeal a reparation order of the commission to the United States Court of Appeals for only the circuit in which a hearing was held; if no hearing was held, the appeal may be filed in any circuit in which the appellee is located. The statute also states that such an appeal must be filed within fifteen days after notice of the order, and that any appeal is not effective unless, within 30 days of the date of the Commission order, the appealing party files with the clerk of the court a bond equal to double the amount of the reparation award.

A party who receives a reparation award may sue to enforce the award if payment is not made within fifteen days of the date the order is served by the Proceedings Clerk. Pursuant to Section 14(d) of the Act, (7 U.S.C. § 18(d) (1982)), as amended by The Futures Trading Practices Act of 1992, Pub. L. No.

By the Commission (chairman SCHAPIRO and Commissioners BAIR, DIAL, TULL and HOLUM).

s/ Jean A. Webb
Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission

Dated: February 8, 1995

102-546, 106 Stat. 3590 (1992), such an action must be filed in United States District Court. See also 17 C.F.R. § 12.407.

Pursuant to Section 14(f) of the Act, (7 U.S.C. 5 18(f) (1982)), as amended by The Futures Trading Practices Act of 1992, Pub. L. No. 102-546, 106 Stat. 3590 (1992), a party against whom a reparation award has been made must provide to the Commission, within fifteen days of the expiration of the period f or compliance with the award, satisfactory evidence that (1) an appeal has been taken to the United States Court of Appeals pursuant to Sections 6 (c) and 14 (e) of the Act or (2) payment has been made of the full amount of the award (or any agreed settlement thereof). If the Commission does not receive the appropriate evidence within the appropriate period, such patty shall be automatically suspended. Such prohibition and suspension shall remain n effect until such party provides the Commission with satisfactory evidence that payment has been made of the full amount of the award plus interest thereon to the date of payment.

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UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

CREATIVE STRATEGY FUND I V. PRUDENTIAL SECURITIES, INCORPORATED, ROBERT ROWLAND, AND THE ROWLAND BROTHERS COMPANY, INC.	:	CFTC DOCKET NO. 93-R014 OFFICE OF PROCEEDINGS PROCEEDINGS CLERK **FEB 23 12:50 PM '94** FILED

Appearances:

WILLIAM SUMNER SCOTT, ESQ. on behalf of complainant.

RICHARD A. MILLER, ESQ. on behalf of Prudential Securities.

JOHN A. FIELD III, ESQ. on behalf of Robert Rowland and The Rowland Brothers Company, Inc.

Before: PAINTER, ALJ

INITIAL DECISION

Preliminary Statement:

Complainant lodged this complaint with the Commission on October 30, 1992, claiming out-of-pocket damages in the amount of $65,733.34 by reason of wrongdoing on the part of respondents, and $58,233.34 for reasonable attorney fees, interest, costs and punitive damages.

Respondent Prudential Securities filed a timely answer and moved for dismissal of the complaint on grounds that a parallel proceeding was pending with the National Futures Association. Prudential claimed a debit balance against complainant in the amount of $101,087.54.

Respondents Robert Rowland and The Rowland Brothers Company filed a timely answer and denied any wrongdoing. More specifically, Rowland maintains that it received no commissions, that commissions generated went to William Sumner Scott, and that the account was not churned.

After extensive discovery this matter was heard in Miami, Florida, on December 1, 1993. The parties have had full opportunity to file post trial briefs and recommended findings of fact and conclusions of law. The matter is ready for decision.

Findings of Fact:

1. William Sumner Scott ("Scott") is an attorney-at-law, licensed in Illinois since 1967. (Tr. 65) At all relevant times Scott was registered with this Commission as a commodity pool operator, commodity trading advisor, and associated person. (Tr. 8)

2. From 1988 to 1991 Scott was associated with Investors Research Corporation, a commodity pool operator. (Tr. 17-18, 20) As the executive vice president of this entity, Scott was responsible for cash management and meeting margin calls. While with Investors Research, Scott met Frank Pusateri, an account executive with Prudential. (Tr. 66)

3. Scott left Investors Research prior to the time the National Futures Association shut down the firm. He maintained an office at that location from 1988 through March 1, 1992. (Tr. 67, 68)

4. Scott created a corporate entity, Creative Strategies, in 1981 to manage commodity pools. He began trading in 1984 or 1985. (Tr. 68-69)

5. Scott had a good opinion of Pusateri (Tr. 20) and in April 1991 he opened account ASH 960342 under the name Creative Strategy Fund I ("CSF"). CSF was a limited partnership. Creative Strategies, Inc. was the general partner of CSF and Scott, as the sole shareholder and President, controlled CSF. (Ex. R-6) Scott maintained that he was the "sole limited partner" of the account, and that all funds deposited in the account were his personal funds. (Tr. 7-8; 24)

6. Scott's purpose in opening the account was to create a favorable track record to be used in soliciting public monies for commodity pools. (Tr. 21)

7. At the time he opened the CSF account, Scott completed and signed all required account opening documents, including risk disclosure statements. He agreed that any and all accounts at Prudential in which he held an interest were subject to a general lien for the discharge of his obligations to Prudential, and he granted to Prudential broad authority to sell, liquidate, cover, assign and deliver any or all securities, commodities, commodity futures contracts, commodity options contracts and so on, without the necessity for a margin call, for the protection of Prudential. (Ex. R-6)

8. Scott specifically authorized Prudential to transfer funds from one account and to another account to avoid a margin call or for any other reason not in conflict with the provisions of the Commodity Exchange Act. (Ex. R-6)

9. Scott was unsuccessful in his trading, and in November 1991 he opened a sub-account, and authorized a commodity trading advisor ("CTA"), R. E. Maseri, to trade the account. The account was designated as account number ASH 960792. (Ex. C-4) In connection with the opening of this sub-account, Scott executed all the required account opening documents. It appears from Exhibits C-4, C-5 and C-8 that Scott intended Maseri to commence trading with a $15,000 base. However, Scott clearly acknowledged in the account opening documents that Prudential was in no way

responsible for any losses that might occur. There is nothing in the evidentiary record to show a loss limitation on the CSF account or the sub-accounts. (Ex. C-8, C-9; Ex. R-6) Complainant did place in evidence a handwritten note, purportedly instructing an employee of Prudential to "allow $15,000 to Robert Rowland and Rowland Brothers to trade in a sub-account --". (Ex. C-12) Again, this document, even if delivered to Prudential, failed to place a loss limit on trading for the accounts in question.

10. Also in November 1991 Scott sought out The Rowland Brothers Company, Inc., to trade the CSF account. To accommodate Scott, Prudential opened sub-account number ASH 960784 to be traded at the direction of CTA The Rowland Brothers. (Ex. R-1) Again, Scott signed all the required account opening documents for the opening of this sub-account, including risk disclosure statements, authorization for Prudential to transfer funds from the account to other accounts, and so on. Thus, on three separate occasions Scott signed all required account opening documents, clearly acknowledging his awareness of the high degree of risk; acknowledging that Prudential was in no manner responsible for any losses incurred in the commodity account; and an agreement to indemnify and hold Prudential harmless from all loss, costs, indebtedness and liabilities arising from the account.

11. As requested by Scott, Prudential sent daily equity runs to Scott's office at Investors Research, located in Jupiter, Florida by way of the Easy Link computer system. Scott testified that he moved to Boca Raton in February or March, and did not request that the equity runs be sent to another location. (Tr. 72-76) I find specifically that Prudential met all its legal obligations to keep complainant informed of the status of the account.

12. The Rowland trading was initially successful. By late March 1992 the accounts, collectively, had an equity of $63,773.00. (Ex. R-2, R-3, R-4)

13. Pasquale Tondi, the operations manager of the Liberty Plaza Branch of Prudential where the accounts in question were

maintained, testified that Exhibit C-12 had not been received by anyone at the Prudential office. (Tr. 172-173)

14. By the close of business on March 31, 1992 the accounts had a total deficit of $13,614.00, resulting in a margin call of $381542.00. (Ex. R-4, R-7)

15. Tondi testified that when dealing with multiple trading advisors, Prudential would open sub-accounts for each CTA. In the instant case, Rowland trades were identified in sub-account numbered ASH 960784, thus enabling the account owner to track the performance of the CTA. However, for margin call purposes, Tondi testified, the accounts were grouped together. (Tr. 179)

16. Scott testified that after leaving Jupiter and moving to Boca Raton, he monitored his account by talking with Pusateri, and by visiting Rowland's office. Scott also conceded that Rowland had power of attorney to trade an account Scott maintained with Cargill, a registered futures commission merchant. (Tr. 106) He testified quite specifically that he was in Rowland's office during late March and early April 1992. (Tr. 106)

17. Scott also testified that he was at the Research Investors office in Jupiter or in Rowland's office at least once every day. (Tr. 139)

18. The combined accounts had equity of $48,951 at the close of business on March 30, 1992. On the close of business the following day, the accounts showed a deficit of $13,614, resulting in a margin call for $38,542. (Tr. 183-185)

19. Tondi testified that he spoke with the trading advisor about the margin call March 30 and, because there was no answer to the margin call, he called Scott. Scott, according to Tondi, stated that he would wire in the money on the following day, April 1. However, on the morning of April 1, Scott stated that he did not have money to meet the margin call. (Tr. 184-187)

20. Scott testified that after 5:00 p.m. March 31 he prepared a letter to terminate The Rowland Brothers' power of attorney to trade the account. (Tr. 60; R-5)

21. Robert Rowland, president of Rowland Brothers, testified that Scott was physically present in the Rowland offices on a daily basis during the time Rowland traded the account, and that Scott received, reviewed, and understood the equity runs on the accounts in question. Rowland further testified that Scott placed no limits on trading, and that Scott had used the figure $200,000 plus as the available funds. (Tr. 232-233)

22. Rowland testified that on March 31, the day Scott terminated his power of attorney to trade the account, he recommended liquidation of the spread positions even though reports received as late as March 27 favored the positions. Scott, according to Rowland, was unwilling to take the loss. (Tr. 233-235)

23. On April 1, 1992 Pusateri telephoned Scott and requested that additional funds be sent in. Scott, according to Pusateri, said he would send in funds the next day. On April 2 Pusateri spoke to Robert Slotnick, the office manager of Prudential, and had Slotnick listen as he again asked Scott to send in funds. Because Scott did not give assurances that the funds would be forthcoming, Pusateri asked Scott to agree to a liquidation point. According to Pusateri agreed to liquidation if the market moved to a specified level. (Tr. 217)

24. On April 3, 1992 Tondi prepared an inter-office memorandum concerning the CSF account, noting that on April 1, Scott had agreed to wire funds in to meet the margin call, but that Scott asked that he be given until the morning of April 2 so that he would not have to wire funds the next day. The memo shows that on April 2 he called Scott again and informed him that there was an outstanding margin call of $83,042. Scott failed to wire funds to meet the call, and the account was subsequently liquidated. (Ex. R7)

25. The CSF account was liquidated on April 2, 1992, resulting in debit balance of $101,087.53. That deficit remains unpaid. (Ex. R-4)

26. On or about May 26, 1992 Prudential, in an effort to collect the debit balance on the account, initiated an action against Scott and CSF with the National Futures Association. (Prudential Answer, Att. 5)

27. on October 30, 1992, the instant complaint was filed with this Commission. Prudential complied with an order to withdraw its action with the National Futures Association against complainant. On May 5, 1993, Prudential filed an amended Answer and Counterclaim in the instant case, seeking to recover a debit balance of $101,087.53 from CSF and William Sumner Scott. The Amended Answer and Counterclaim was accepted as to CSF and Creative Strategies, Inc., and denied as to Scott. Complainant and Creative Strategies, Inc., filed an Answer to the Counterclaim on June 10, 1993, and denied any liability to Prudential.

DISCUSSION:

William Sumner Scott is an attorney-at-law, a registered commodity trading advisor, commodity pool operator, and associated person. From 1988 to 1991 he was employed by Investors Research, a pool operator, and his main duties included cash management and meeting margin calls for the pools. He is unusually well trained for commodity futures trading. Scott created CSF as a limited partnership. The general partner of CSF, and sole limited partner, is creative Strategies, Inc., a corporation solely owned by Scott. Scott testified that he was the only person to invest money in the accounts at issue. Scott had complete control over the selection of commodity trading advisors. In sum, this was a Scott operation. His plan, in opening the CSF account, was to acquire a favorable track record that could be used in soliciting the public to invest in commodity pools he would manage.

Scott's plan was to make use of one or more commodity trading advisors, and he arranged with Prudential to set up sub-accounts for

the master CSF account, and thus be able to evaluate the performance of different trading advisors. in opening the master account and the sub-account, Scott signed all the requisite documents, including routine authorization for Prudential to sell or purchase any and all credit balances, securities, options on securities, commodities, commodity futures contracts, and all other property of whatsoever kind belonging to Scott and held by Prudential to discharge any obligations Scott had to Prudential. There is no question but that Prudential had legal authority to apply the funds Scott deposited in the CSF account to satisfy CSF's obligations to Prudential.

Scott first did the trading for the CSF account, and did not fare well. He then sought out CTA Maseri for a sub-account. Still later, he signed up The Rowland Brothers to manage a second sub-account. The big losses in this case arose in the sub-account managed by Rowland.

Scott was not a passive investor in this affair. Initially, he was officed at Investors Research, and at his instructions account statements were sent to that office by computer. After signing up The Rowland Brothers, Scott began to spend most of his time in the Rowland Brothers office. As noted in the findings, Scott was intimately acquainted with every detail of the trading that took place. He had authority, at all times, to terminate the services of the CTAs, and to close out all positions.

In January 1992 trading was going well in the Rowland-managed sub-account. Scott admitted in his testimony that he watched the account grow, and he was cogently aware that the account had as many as 150 contracts in that month. And Scott knew the account was profitable. Scott insisted, however, that he did not discuss the account with Rowland and never reviewed the equity runs because he was busy running other pools. (Tr. 141-143) This testimony is simply unbelievable. I accept as true Robert Rowland's testimony that Scott received, reviewed, and understood the equity runs on a regular basis.

In late March the market went against the sub-account managed by Rowland. Margin calls were made. Scott did not satisfy the margin calls. On March 31 Scott terminated Rowland's power-of-attorney. He gave assurances on April I that he would meet outstanding margin calls. He failed to do so. He agreed to the liquidation point suggested by Pusateri. Liquidation resulted in a debit balance of $101,087.53. That debit has not been paid.

Complainant has failed to place in evidence any probative evidence showing that the respondents violated the Commodity Exchange Act in connection with the handling of complainant's account. The account was liquidated on April 2, 1992. Prudential, as early as April 16, 1992, notified Scott that it would initiate proceedings to collect the debit balance. In May 1992 Prudential filed an action against Scott with the National Futures Association. In August 1992 Scott advised counsel for Prudential that he was electing the CFTC as a forum to adjudicate this dispute. It was not until October 30, 1992 that Scott actually filed a complaint against the respondents with this agency. Unfortunately for Scott, there is not a scintilla of merit to his complaint.

Prudential has established by a preponderance of the evidence that complainant owes a debit balance of $101,087.53, and that debit balance remains unpaid. Prudential is entitled to a judgment against Creative Strategy Fund I and its general partner, Creative Strategies, Inc.

ORDER

Complainant has failed to establish by the weight of the evidence that respondents violated the Commodity Exchange Act in connection with the handling of complainant's master account and sub-accounts. The complaint is DISMISSED WITH PREJUDICE.

Prudential has established by the weight of the evidence that complainant owes a debit balance of $101,087.53. Creative Strategy Fund I and its general partner, Creative Strategies, Inc., are ORDERED to pay to Prudential $101,087.53, plus interest at the

rate of 3.5% per year from April 2, 1993, to the date the judgment is paid. Liability for payment of this award is joint and mutual.

Dated this 23rd day of February 1994

s/ George H. Painter
George H. Painter
Administrative Law Judge

United States Court of Appeals
For the Eleventh Circuit

No. 96-4466

PRUDENTIAL SECURITIES, INC.,

Plaintiff-Cross-
Defendant-Appellee,

versus

CREATIVE STRATEGY FUND I,
and its general partner,
CREATIVE STRATEGIES, INC.,

Defendants-Cross-Claimants
Third-Party-Plaintiffs-
Appellants,

FRANK S. PUSATERI,

Third-Party-Defendant.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR - 8 1997
MIGUEL J. CORTEZ
CLERK

On Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: BIRCH, DUBINA and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 96-4466
Non-Argument Calendar

D. C. Docket No. 95-8423-CIV

PRUDENTIAL SECURITIES, INC.,

Plaintiff-Cross-
Defendant-Appellee,

versus

CREATIVE STRATEGY FUND I,
and its general partner,
CREATIVE STRATEGIES, INC.,

Defendants-Cross-Claimants
Third-Party-Plaintiffs-
Appellants,

FRANK S. PUSATERI,

Third-Party-Defendant.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 21 1997
MIGUEL J. CORTEZ
CLERK

Appeal from the United States District Court
for the Southern District of Florida

Before BIRCH, DUBINA and CARNES, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and

briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that defendants-appellants pay plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

Entered: January 21, 1997
For the court: Miguel J. Cortez, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 4/17/97

Supreme Court, U.S.
FILED
AUG 7 1997
CLERK

CASE NO. 97-63

In the Supreme Court of the United States

October Term, 1996

CREATIVE STRATEGY FUND I, and
CREATIVE STRATEGY, INC.,
Petitioners,

vs.

PRUDENTIAL SECURITIES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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25 pp

RULE 14.1(b) STATEMENT

Petitioners do not fully identify the parties below. Petitioners are here seeking review of a decision of the United States Court of Appeals for the Eleventh Circuit where they appeared as appellants. They are Creative Strategy Fund I, a Pennsylvania limited partnership, and its general partner, Creative Strategy, Inc., a Delaware corporation, collectively referred to as the "Fund." William S. Scott, Esquire, is the sole limited partner of the partnership, and he is the sole stockholder of the corporate general partner. Mr. Scott is also counsel of record for petitioners in this Court, and was such counsel in all prior proceedings.

Respondent is Prudential Securities, Inc. ("Prudential"), one of two appellees named by the Fund in the Eleventh Circuit proceedings. The other party named as an appellee by the Fund below was Frank S. Pusateri, an individual. He never appeared below because (a) the pleading that named him was stricken by the district court, and (b) he was never served. Prudential is therefore the only respondent here.

RULE 29.6 STATEMENT

Petitioners' corporate disclosure statement is correct as to petitioners but incomplete as to respondent. There are no non-wholly owned subsidiaries of Prudential Securities, Inc. It is wholly owned by its parent, The Prudential Insurance Company of America.

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CASE NO. 97-63

In the Supreme Court of the United States

October Term, 1996

CREATIVE STRATEGY FUND I, and
CREATIVE STRATEGY, INC.,

Petitioners,

vs.

PRUDENTIAL SECURITIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, Creative Strategy Fund I and Creative Strategy, Inc. (collectively referred to herein as the "Fund"), seek this Court's certiorari review of the decision of the United States Court of Appeals for the Eleventh Circuit, rendered without opinion, affirming the judgment of the United States District Court for the Southern District of Florida in favor of Prudential Securities, Inc. ("Prudential"). The judgment of the district court enforced an arbitration award made in a reparations claim filed by the Fund under § 14 of the Commodity Exchange Act, 7 U.S.C. § 1, *et. seq.* ("CEA"). The original reparations award

had been made in favor of Prudential by an administrative law judge acting within the Commodity Futures Trading Commission ("CFTC"), which decision was later affirmed by the full Commission in an administrative appeal.

The Fund has failed to establish, as required by Rule 10 of the Rules of this Court, the existence of conflict between the decision of the Eleventh Circuit and any decision of this Court or any other court of appeals. This respondent therefore submits this brief in opposition to the instant petition for writ of certiorari and suggests that this case does not warrant certiorari review by this Court.

STATEMENT OF THE CASE[1]

A. Introduction

The Fund is a commodities trader, and Prudential is, *inter alia*, a commodities broker. The Fund lost money in accounts it maintained at Prudential's Palm Beach County, Florida, office when trading in certain commodities futures turned sour. Prudential covered losses sustained by the Fund in one of its accounts by transferring money from another. A deficiency remained; Prudential sought to recover the deficiency balance from the Fund by resorting to arbitration proceedings before the National Futures Association ("NFA").[2]

Unhappy with Prudential's attempt to obtain arbitration of the parties' differences before the NFA, the

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[1] Petitioners' statement of the case is incomplete, argumentative and conclusory. Prudential therefore restates the case and the facts.

[2] The typical reparations drama which unfolded here is described succinctly in *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833, 843, 106 S. Ct. 3245, 3252-53 (1986), which remains the single most comprehensive authority on the workings of the statutory mechanism involved here. The mechanism establishes an inexpensive forum for adjudicating customer complaints against futures industry professionals.

Fund elected to have its claims adjudicated before the CFTC's Reparations Division. The CFTC is an administrative agency of the United States government. The Fund lost when the agency's administrative law judge ("ALJ") ruled in favor of Prudential, awarding it $101,087.54. The Fund then took an appeal of the ALJ's decision to the full Commission, which affirmed, concluding the administrative process for both trial and appeal.

Judicial review of the full Commission's appellate findings was available to the Fund, but only in the United States Circuit Court of Appeals for the Eleventh Circuit. The Fund filed a notice of appeal to that court, but then elected not to pursue that avenue of further review because of the statutory bond-posting requirement. That prior appeal to the Eleventh Circuit was therefore dismissed.

Prudential then sued in district court to confirm and enforce its arbitration award. The Fund challenged the bona fides of the arbitration process, attempting to establish fraud and bias in the prior proceedings. The district court agreed with Prudential that this matter had already been litigated to finality, and confirmed the CFTC award. Final Judgment was entered for the amount of the award, plus attorneys' fees and costs. The Fund appealed the district court's decision to the Eleventh Circuit (i.e., the Fund's second appeal to that court). It affirmed without opinion, and the instant Petition for Writ of Certiorari followed.

B. Administrative Proceedings

In late 1992, the Fund lodged its complaint against Prudential and others in a reparations proceeding before

the CFTC.[3] The action arose from a reparations claim filed pursuant to § 14 of the CEA. The Fund was represented in those reparations proceedings by its creator and sole limited partner, William Sumner Scott, Esquire. In addition to being a member of The Florida Bar, Mr. Scott is a professional commodities speculator registered with the CFTC and the NFA as a commodity trading advisor and commodity pool operator. Mr. Scott is moreover the Fund's counsel of record, both here and in all prior proceedings of this dispute.

The Fund complained that Prudential improperly transferred $65,733.34 from one of the Fund's Prudential accounts to another. Prudential denied the Fund's claims and counterclaimed for $101,087.54, arising from the debit balance that the Fund created in the course of its trading at Prudential. The action proceeded to final hearing before the ALJ in December of 1993 at a hearing in Miami, [illegible] Mr. Scott appeared as counsel and sole witness for

On February 23, 1994, the ALJ issued his Initial Decision, App. F. Among his several findings, the ALJ concluded that, "Unfortunately for Scott, there is not a scintilla of merit to his complaint." *Id.*, at 53. The ALJ added, "Prudential has established by a preponderance of the evidence that complainant owes a debit balance of $101,087.53, and that debit balance remains unpaid." *Id.* [illegible]itial Decision vindicated Prudential's actions in [illegible]ng the Fund's account in every respect, including the transfer of monies among the various accounts maintained at Prudential by the Fund, the liquidation of the Fund's positions after it failed to meet a margin call, and the calculation of the debit balance.

[3] The administrative proceedings below, as summarized herein, are set out in the ALJ's Initial Decision, dated February 23, 1994, and the Order of the CFTC, entered February 8, 1995; these decisions are included in the Fund's Appendix as App. F, at 45-54, and App. E, at 39-43, respectively.

Dissatisfied with this result, and pursuing available remedies for appellate review, the Fund perfected an appeal of the Initial Decision to the full, five-member CFTC Commission. The Commission carefully reviewed the trial record and entered its comprehensive decision which corrected one immaterial factual finding made by the ALJ. The Commission entered its Order on February 8, 1995, finding that the ALJ's Initial Decision was ". . . both reasonable and supported by the record as a whole . . ." App. E, at 41-42. In unanimously affirming, the Commission adopted the ALJ's factual findings as its own (with the one immaterial exception noted).

Following entry of the CFTC Order, affirming both the dismissal of the Fund's Complaint against Prudential and the award of damages to Prudential, the Fund attempted to perfect an appeal to the Eleventh Circuit, but without first posting the bond required by federal law.[4] The Commission's general counsel opposed the Fund's attempt to obtain appellate review without posting the proper bond. Those appeal proceedings in the Eleventh Circuit were abandoned and later dismissed.

C. Judicial Proceedings

In March of 1995, the Fund attempted a collateral attack upon the final CFTC decision by filing suit in state court in Palm Beach County, Florida. That challenge was unsuccessful, as was the appeal taken from the adverse state court decision to the District Court of Appeal of Florida, Fourth District. (The Fund does not here seek review of these state court proceedings.)

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[4] Enforcement of a reparations award and appellate review of a CFTC decision are provided for at 7 U.S.C. §§ 18 (d) and (e), respectively. The Fund's later-abandoned appeal to the Eleventh Circuit is described in the district court's Order of October 21, 1995, included in the Fund's Appendix as App. C. The verbatim text of the cited statutory sections is included in that Order, App. C, at 32-33.

In July of 1995, Prudential commenced the action below by filing its Petition to Enforce Arbitration Award in the United States District Court for the Southern District of Florida. The action was filed pursuant to the Commodity Exchange Act, 7 U.S.C. § 18(d), and Rule 12.407 of the Commodity and Securities Exchange Rules Relating to Reparations, 17 C.F.R. § 12.407; it sought final judgment enforcing payment of the unpaid reparations award made by the CFTC.

On October 31, 1995, the district court entered its Order, App. C, at 29-36, in which the court recited the procedural history of the dispute, noted dismissal of the previous appeal to the Eleventh Circuit from the CFTC decision, and held in pertinent part as follows:

> The matters upon which Creative Ltd. and Creative Inc. base their motion to dismiss and motion for temporary restraining order are matters that were already litigated before the CFTC. The proper forum to review the CFTC Reparations order is the United States Eleventh Circuit Court of Appeals. Creative Ltd. and Creative Inc. did not perfect their appeal to the Eleventh Circuit as required pursuant to 7 U.S.C. § 18(e). Having failed to perfect their appeal, Creative Ltd. and Creative Inc. cannot now litigate the same matters before this Court. This Court's jurisdiction over this matter is limited to the terms set forth in 7 U.S.C. § 18(d). The terms of § 18(d) clearly state that the CFTC Reparations Order is final and conclusive unless an appeal is taken to the United States Court of Appeals pursuant to § 18(e).

App. C, at 34. The district court noted that it was not simply denying the Fund's Motion to Dismiss, but was treating the applications filed by both sides as requests fo summary judgment. The court then directed Prudential t

submit a proposed form of final judgment which would grant the relief it sought. At that point, but for settling the terms of the final order, it appeared that all litigation had come to an end.

After the district court's October 31, 1995, Order, summarily adjudicating the dispute and directing Prudential to submit a proposed form of final judgment, the Fund filed its purported Answer, Affirmative Defenses, Crossclaim and Third-Party Complaint. In addition to the Answer and Affirmative Defenses, reiterating matters described in the Fund's prior filings, the Fund attempted to assert a Third-Party Complaint and Crossclaim against an individual named Frank S. Pusateri (who was later named as an appellee in the Fund's second appeal to the Eleventh Circuit).

On March 11, 1996, the district court entered two Orders. The first granted Prudential's request that the Fund's Answer, Affirmative Defenses, Crossclaim and Third-party Complaint be stricken from the record. App. B, at 27-28. The second was a Final Judgment in favor of Prudential and against the Fund for the amount of the arbitration award, plus attorneys' fees and costs, for a total money judgment of $111,639.78. App. A, at 25-26.

The Fund appealed the district court's decision to the Eleventh Circuit, which affirmed without opinion by its Judgment entered January 21, 1997. App. H, at 57-58. The Fund's rehearing application was denied April 8, 1997. App. G, at 55-56. This Petition followed.

REASONS FOR DENYING THE PETITION

1. This Petition raises no important question of federal law that has not been, but should be, settled by this Court, nor does it

establish that the United States Court of Appeals for the Eleventh Circuit has rendered a decision in conflict with a decision of another United States court of appeals on the same important matter.

The instant Petition should be denied because it lacks any "compelling reasons" for granting it, as required by Rule 10 of this Court. The immediate object of review sought by the Fund is a judgment of the Eleventh Circuit affirming, without opinion, a decision of a district court. Since there was no opinion, it is not simply that conflict has not been shown, but that a showing of conflict is impossible. There is no "important question" raised by or appearing in the decision under review, because no reasons were given for affirming. While the language of the Court's Rules 10(a) and (c) is neither controlling nor fully measuring of the Court's discretion under Rule 10, the illustrations provided by the Rule demonstrate beyond question that a decision from a court of appeals, which does no more than affirm a district court decision, does not rise to the level of magnitude necessary for this Court to exercise its jurisdictional discretion.

This Court has many times defined the narrow parameters of its certiorari jurisdiction. In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S. Ct. 614 (1955), the Court observed as follows, regarding its then-current rule for granting certiorari review:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . "Special and important

> reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

349 U.S. at 74, 75 S. Ct. at 616. Similarly, in *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S. Ct. 453 (1951) , the Court held:

> Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."
> . . .
>
> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." . . .

340 U.S. at 502-503, 71 S.Ct. at 456.

More recently, the Court held in *Braxton v. United States*, 500 U.S. 344, 111 S. Ct. 1854 (1991), that the principal purpose for which the Court permits invocation of its certiorari jurisdiction is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. And, in *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117, 114 S. Ct. 1359 (1994), the Court held:

> Even if the constitutional question presented is hypothetical as to everyone else, it would seem to be of great practical importance to these litigants. But that is ordinarily not sufficient reason for our granting certiorari — even when unnecessary constitutional pronouncements are not in the picture.

114 S. Ct. at 1362. This case poses issues presumably of "great practical importance" to the Fund, but no conflict is presented and there is no Rule 10 reason shown why discretionary jurisdiction should be exercised in this case.

2. This Petition seeks review of matters now barred by the doctrine of *res judicata*.

The Fund complains of irregularity in the decision rendered by the CFTC when it failed to conduct an adequate or proper review of the ALJ's Initial Decision. The Fund suggests or implies the existence of some rule that a reviewing body must remand a case to the fact-finder for further proceedings where the reviewing body takes issue — no matter how slightly — with factual determinations made below. The Fund argues that, because the CFTC refused to remand this case to the ALJ after it took issue with a minor point in his fact-finding, the CFTC Order is not enforceable as a matter of law.

There is neither rationale nor authority offered or cited in support of the assertion of this novel "rule." Since

the Fund has not otherwise articulated or identified the rule to which it refers, and since Prudential is unable to find anywhere a rule requiring administrative agency appellate remand under these facts, no further response appears necessary.

There is however *another* rule which should end this inquiry. This Court has previously held that an administrative decision will be given *res judicata* effect when,

> . . . an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. . . .

United States v. Utah Construction & Mining Co., 384 U.S. 394, 86 S. Ct. 1545 (1966). *See also, Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241 (11th Cir. 1985), and *City of Pompano Beach v. F.A.A.*, 774 F.2d 1529 (11th Cir. 1985). The administrative decision approved by this Court in *Utah Construction, supra*, was the result of a full adversary proceeding with testimony, cross-examination, exhibits, briefs, and argument. *City of Pompano Beach. Id.*, 774 F.2d at 1538-39, n.10.

There is still another "rule" that the decision of an appellate court at an earlier stage of the same proceeding represents the law of the case. *Gaines v. Dougherty County Bd. of Educ.*, 775 F.2d 1565 (11th Cir. 1985). In view of the rule expressed in *City of Pompano Beach, supra*, there would appear to be no reason why the decision in *Gaines* would not apply with equal force to an earlier decision of an appellate body, convened as a part of administrative agency proceedings. In *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967), the court observed,

> [t]he "law of the case" rule is based on the salutary and sound public policy that litigation

> should come to an end. It is predicated on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members," and that it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal" thereof.

Id., as quoted in *Gaines, supra*, 775 F.2d at 1568. The combined effect of the holdings of *Gaines, White* and *City of Pompano Beach* is that the Eleventh Circuit and the district court were required to accord to the CFTC's decision the same dignity and finality that would be accorded the judgment of another district court.

By *res judicata* and law of the case, and because it is the same dispute involving the same parties, this matter reached finality and the book was closed when the CFTC Order became final without modification by a higher tribunal. Whatever may be the Fund's disagreement with the process used by the CFTC, the door to further litigation of that dispute was closed when appellate review of those proceedings was abandoned.

3. Removing the CFTC order from those which may be cited as agency precedent is neither wrongful nor constitutionally significant.

In the first and third questions presented for review, the Fund chafes at the CFTC affirming but not remanding the ALJ's decision after finding that it contained an immaterial error. Review by this Court is warranted,

argues the Fund, because grave matters of constitutional magnitude are implicated. Key elements of this common theme appear throughout the Petition.

The Fund first focuses the issue as follows:

> The Commission corrected these errors by withdrawal of the decision from those which may be considered agency precedent. Although the Commission may withdraw agency decisions which are consistent with other findings and superfluous, *it is an abuse of process for the Commission Order to attempt to correct defects by withdrawal of its application to others similarly situated and, thereafter, for the lower courts to grant this defective Order full right of enforcement under the Act.*

Petition ("Pet."), at 10 (emphasis supplied). Who found an abuse of process is not stated; this not-otherwise attributed chasm leap assumption can only be the Fund's. Continuing, the Fund urges,

> . . . [T]he Commission was obligated by the Act to either conduct independent fact finding or, pursuant to the ruling in *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988), to remand the case to the administrative law judge, for a determination of the effect of the finding of two separate accounts and the deletion of the full set of documents for Account B on the Initial Decision. *Petitioner requests this Court to now correct this mistake of law by denial of enforcement of the Commission Order.*

Id., at 12 (emphasis supplied). The Fund is here urging that this Court leapfrog the circuit and district court decisions below, ignore the original appeal's dismissal, and raise to constitutional magnitude the CFTC's decision to

affirm without remand. The argument is fervent, but its foundation in Rule 10 is non-existent.

Again, there is neither rationale offered nor authority cited for the interesting "rule" advanced in this argument, and the decision in *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988), addresses neither side of the issue. (*Bonar*'s significance is its holding that arbitrators are capable of detecting and dealing with fraud.) Why or how these circumstances create a constitutional issue crying out to be settled now by this Court is left undeveloped. It appears once again that the Fund could find no authority for its novel premise, and neither can Prudential.[5]

4. It is now too late to challenge the double-bond requirement.

The Fund argues that the double-bond requirement of the CEA is unfair and unreasonable because it fails to deal with the circumstance encountered here, where the alleged victim of the wrongs complained of — a commodities trader formed as a limited partnership to take financial risks with its venture capital — had the further misfortune of having put *all* of its capital into the investment vehicle that went sour. As a result of having placed every cent at risk and having then lost, this speculator had no money left to hire outside counsel or pay the double-bond required to perfect its appeal from the CFTC Order under 7 U.S.C. § 18(e). While the argument may generate some modicum of sympathy, there is no conflict issue presented, nor is there disclosed any legal

[5] As the Fund appears to acknowledge, Pet. at 10 (above-quoted), courts and agencies frequently make decisions that are withheld from the body of *stare decisis* where it is determined that nothing is added to that body by the case at hand. Why it is wrong, let alone unconstitutional, for no-one but the Fund to be bound by the CFTC decision here is another argument left undeveloped.

foundation for a challenge of constitutional proportions to the requirement that a third legal proceeding — after the ALJ trial and the CFTC appeal — be conditioned upon an appeal bond of twice the amount the claimant has twice been found to be due.

On closer analysis, it is apparent that the Fund has nothing of which to complain, and that its authorities are inapposite. It argues the rights of indigents, Pet. at 19, as if it were an indigent individual caught up in some deprivation of personal liberty callously sanctioned by the lower court proceedings. It tries unsuccessfully to invoke sympathetic images of "[t]he poor," Pet. at 17, overlooking the marketplace reality that the "the poor" generally do not trade in commodities futures, and no person or business entity — rich or poor — is required to engage in this form of speculation.[6] By urging this approach to the facts of this case, the Fund trifles with the constitution and this Court's role as its ultimate protector.[7] Furthermore, the Fund's reliance upon *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976), is misplaced, where that case considered totally different facts arising under the Perishable Agricultural Commodities Act of 1930 — a legislative scheme having nothing whatever to do with the instant dispute.

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[6] *Myron v. Martin*, 670 F.2d 49 (5th Cir. 1982), found no equal protection violation in the CEA's double-bond requirement. The Fund strongly disagrees, with *Myron*, Pet. at 17, but fails to identify some other judicial decision which also disagrees with *Myron*. The strong disagreement of a certiorari petitioner does not establish warrant for certiorari jurisdiction in this Court under Rule 10.

[7] The Fund argues, "There can be no equal justice when the right to *file an appeal* depends on one's ability to pay [emphasis supplied]," citing to Supreme Court of Florida Chief Justice Barkett's concurring opinion in *Psychiatric Associates v. Siegel*, 610 So. 2d 419 (Fla. 1992), where a statute that required the posting of a substantial bond before suit could be filed was struck down. What Justice Barkett said in her concurring opinion was, "There can be no equal justice when the right to *file suit* depends on one's ability to pay [emphasis supplied]," 610 So. 2d at 426.

Moreover, the time to complain about the CEA and its double-bond requirement was when this matter first went to the Eleventh Circuit. That court, in the first appeal, was fully capable of appraising the argument now urged here. In *Rosenthal & Co. v. Bagley*, 581 F.2d 1258 (7th Cir. 1978), the court held:

> The District Court denied preliminary injunctive relief and, on the defendants' motion, dismissed the action, holding that, because the plaintiff could present its claim of unconstitutionality to the court of appeals in a direct review of the administrative proceeding under 7 U.S.C. § 18(g), declaratory or *injunctive relief interrupting the administrative proceedings was unavailable*. We agree, and affirm the judgment.

Id., at 1259 (emphasis supplied). If there was a constitutional issue, the time to have urged it was through a CEA appeal to the Eleventh Circuit from the reviewing decision of the CFTC. Since that avenue of appellate relief was not pursued and the earlier appeal was dismissed, any remedy has now been lost.

Lastly, nothing in the statutory scheme suggests even for a moment that Congress intended that the Fund should have the option of foregoing its earlier appeal — thereby neatly avoiding the bond requirement — and then later raising the same issues in these proceedings, where the Fund found its way a second time to the Eleventh Circuit without having to post any bond at all. That court's subject matter jurisdiction in the former dispute was lost when the prior appeal was dismissed. Nothing the Fund has presented here suggests that the Eleventh Circuit, in this action, could have properly reopened the prior appeal.

5. This Petition impermissibly asks the Court to exercise discretionary jurisdiction based upon

(a) factual findings claimed to be erroneous, and (b) arguments not fairly included in the questions presented.

By this Court's Rule 10, the Court has specifically advised that a petition for a writ of certiorari is "rarely granted" when the asserted error consists of "erroneous factual findings" or the misapplication of a properly stated rule of law. In this case, the Fund is absolutely convinced that the ALJ misunderstood or misinterpreted the evidence being presented at the original administrative hearing, when he supposedly undertook to carefully consider the credibility of witnesses and the evidence adduced. The Fund — through Mr. Scott, as client, counsel and sole witness — strongly disagreed with the factual determinations made by the ALJ.

However, a complaint regarding these allegedly flawed factual findings was then taken to the full Commission, which reviewed the record created by the ALJ and affirmed. For reasons discussed above, an appeal to the Eleventh Circuit followed but was later abandoned and dismissed. Still unhappy with the contrary view of the facts being taken by a growing number of judicial officers, the Fund continued to press its differing view of the facts in the district court and in the Fund's second trip to the Eleventh Circuit. In its Petition here, the Fund continues to argue erroneous factual determinations.

Under the language of Rule 10, and the above-quoted language from *National Labor Relations Board v. Pittsburgh S.S. Co., supra*, 340 U.S. at 502-03, 71 S.Ct. at 456, the Fund's express reliance upon disputed factual matters not only fails to establish warrant for certiorari review, it affirmatively demonstrates that the instant Petition should be denied. With this dispute now having been lodged in seven different agency or court proceedings — not including two Florida state court actions — the

concept of being entitled to one's "day in court" has all but lost its meaning. Since the order here for review affirmed without opinion and could not have involved original fact finding, there can be no viable establishment of jurisdiction here based upon the ostensibly flawed finding of facts in some prior proceeding.

Lastly, the Fund presents a brief but less than concise argument that, "If this were an arbitration proceeding, . . . [a] scan of the record would be required." Pet., at 14. Authority for this proposition is cited as *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920 (1995). The cited case only considered how a district court should review an arbitrator's decision that the parties agreed to arbitrate a dispute, and how a court of appeals should review a district court's decision confirming, or refusing to vacate, an arbitration award. *First Options* neither addresses nor resolves any issue here, including whether the record needs to be scanned. More significantly, from the procedural perspective of the Court's rules, neither the scanning question nor the holding in *First Options* appear to be fairly encompassed by any of the questions presented here.[8]

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[8] The Fund's first and third questions presented for review quarrel with the CFTC having affirmed the ALJ without remanding a minor factual issue. The second and fourth questions deal with the double-bond requirement and whether Prudential may now even argue the point. Nowhere has the Fund presented a certiorari issue dealing with CFTC jurisdiction to adjudicate state law claims, and the decision here for review is of course silent.

Nonetheless, the argument relying upon *Blunt, Ellis & Loewi, Inc. v. Hlavinka*, 896 F.2d 240 (7th Cir. 1990), is without merit. Later developments in the cited case led to *Hlavinka v. Blunt, Ellis & Loewi, Inc.*, 497 N.W.2d 756 (Wis. 1st DCA 1993), where the Wisconsin appellate court correctly explained and resolved the seeming anomaly created by the earlier federal court decision. Where the CFTC may lack jurisdiction to hear certain state law claims, the making of such a later claim will still be barred by collateral estoppel where the *facts* necessary to determine the claim have all been previously litigated before the CFTC.

CONCLUSION

The Petition for a Writ of Certiorari should be denied for failing to demonstrate any important reason why this Court should exercise its jurisdictional discretion.

Respectfully submitted,

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AUG 14 1997
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No. 97-63

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

Creative Strategy Fund I, and
Creative Strategy, Inc., Petitioners

v.

Prudential Securities, Inc., Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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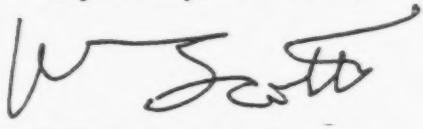
THE FUND BY WRITTEN DIRECTION LIMITED THE AMOUNT TO BE PLACED AT RISK TO $15,000

On page 14, in the second full paragraph, of its Brief in Opposition to Petition for Certiorari, Prudential states: "As a result of having placed every cent at risk and having then lost, this speculator had no money left to hire outside counsel or pay the double-bond required to perfect its appeal from the CFTC Order under 7 U.S.C. Section 18(e)."

The truth is the Fund directed Prudential to place only $15,000 at risk in the account which had a power of attorney granted to the independent commodity trading advisor. It was Prudential's undisclosed, unauthorized, unilateral, use of $50,733.34 in the separate, segregated cash account as margin for the positions placed by the commodity trader directly to Prudential which caused the $166,820.27 loss in the $15,000 account.

The fraudulent misstatement by Prudential quoted above is the justification Prudential has used to, thus far, abuse the alternative dispute resolution process to justify the theft of all of the money of the Fund which was on deposit at Prudential and also prevent the Fund from the presentation of its case to the Courts. The alternative dispute resolution process and access to the courts deserve the grant of this Petition to ultimately prevent these abuses. Particularly since the Commodity Exchange Act, which block access to the courts also specifically grants the exclusive authority to Prudential to hold the money of the Fund.

Respectfully, submitted,



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